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H.L.A. Hart's Rule of Law: The Limits of Philosophy in Historical Perspective

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I was delighted by the Quaderno's invitation to contribute to this volume on 'The Rule of Law and Criminal Law'. But the specific form of the invitation posed me with an interesting challenge. I have been asked to write an essay on H.L.A. Hart's contribution to the topic; yet I have also been given to understand that the volume is particularly concerned with the historical development of ideas associated with the rule of law. Hart's approach to the topic, however, was distinctively analytic rather than historical. It will come as no surprise to readers that, as his biographer (Lacey, 2004), I am an admirer of Hart's work. On the other hand, I am also persuaded that philosophical analysis of key legal and political concepts needs to be contextualized both historically and institutionally, and that Hart's relative lack of interest in this sort of contextualization marks a certain limit to the insights provided by his legal and political philosophy (Lacey, 2006).

In what follows, therefore, I shall use Hart's analysis of the rule of law as a jumping off point to consider the relationship between conceptual and historical analysis. While conceding the distinctive strengths of these particular forms of analysis, I shall argue, ultimately, for their interdependence. I shall begin by setting out Hart's main contributions to our conceptual understanding of the rule of law and its significance. I shall then argue that, in some formulations, Hart's own approach implied a more contextual and indeed functional approach than he himself was willing to acknowledge. Finally, I shall draw on some of my own current research on the historical development of ideas of responsibility for crime, in order to pose some of the questions about the rule of law which a socio-

historical analysis places on the scholarly agenda, and to suggest how Hart's overall conception might be put to use in addressing them.

Hart's analysis of the rule of law

There are a number of ways in which one might approach Hart's contribution to our understanding of the rule of law. On one view, we might see the very project of legal positivism as an essential plank in the intellectual and practical infrastructure of the rule of law. The central aspiration of positivism is, after all, to provide tools whereby the law can be identified in terms of criteria of recognition, and hence distinguished not only from brute force or arbitrary exercises of power but also from other prevailing social norms deriving from custom, morality or religion. Such a process of identifying law might be seen as an essential precondition to any view of law as placing limits on power. Moreover, Hart's distinctive version of legal positivism (Hart 1961) might be seen as having yet closer affinities with the rule of law tradition. For, in moving from the early positivist notion of law as a sovereign command to the notion of law as a system of rules, Hart produced a theory which spoke to the social realities of law in a secular and democratic age. The concept of law as a system of rules fits, after all, far better with the impersonal idea of authority embedded in modern democracies than does the sovereign command theory of the Nineteenth Century positivists John Austin and Jeremy Bentham. Hart's theory of law therefore expressed a modern understanding of the ancient ideal of 'the rule of law and not of men', and provided a powerful and remarkably widely applicable rationalisation of the nature of legal authority in a pluralistic world. It offered not only a descriptive account of law's social power but also an account of legal validity which purported to explain the (limited) sense in which citizens have an obligation to obey the law. Notwithstanding its claim to offer a universally applicable account – a claim to which we shall return below – it seems highly likely that the extraordinary success of The Concept of Law derives at least in

part from these resonances with features of political structure and culture in late Twentieth Century democracies, and in particular with contemporary images of the rule of law.

The Concept of Law however provides us with very little by way of direct or detailed discussion of the rule of law. Explicit reference to the concept is confined to Chapter 9's relatively terse discussion of what Hart saw as the distinctive principles of legality and justice which represented the kernel of insight in the natural law tradition: natural justice, judicial impartiality, and the principle of legality. For his most elaborated consideration of the rule of law, we have to look rather to 'Positivism and the Separation of Law and Morals' (Hart 1957-8). This essay was originally delivered as the Holmes lecture at Harvard in 1957, and was then published, along with a reply by natural lawyer Lon Fuller (Fuller, 1957-8; see also Fuller 1964), in the Harvard Law Review. In this paper, Hart mapped out his agenda as the intellectual successor to the legal positivism of Jeremy Bentham and John Austin. In particular, he defended their brand of analytical jurisprudence against the charges laid by the two groups of legal theorists whom he saw as the main antagonists to his own genre of theory. He rejected the charge, current in much American Realist jurisprudence of the first half of the Twentieth Century, that legal positivism provides a mechanistic and formalistic vision of legal reasoning, with judges simply grinding out deductive conclusions from closed sets of premises. And, as against the claim of modern natural lawyers, he defended the positivist insistence on the lack of any necessary, conceptual connection between law and morality, and denied that this betrayed an indifference to the moral status of laws. Hart insisted on the propriety of Bentham's distinction between descriptive, 'expository' jurisprudence, and prescriptive, 'censorial' jurisprudence'. Indeed – and here lies the kernel of his position on the rule of law - he claimed that there are moral advantages to making a clear separation between our understanding of how to determine what the law *is* and our criticisms or vision of what it *ought to be*.

Hart's and Fuller's articles quickly became, and still remain, a standard scholarly reference point and teaching resource for the opposition between legal positivism and natural law theory, and for the implications of this debate for our conception of the rule of law. The reason for this instant and lasting success is not difficult to discern. The sharp joinder of issue between the two men was thrown into relief, given poignancy and made immediately accessible by the fact that it took place in the shadow of widespread debates about the legitimacy of the Nuremberg Trials, and centred on a vivid example. This was the case of the 'Nazi informer': a woman who, during the Third Reich, had relied on prevailing legal regulations to denounce her husband as a political dissident. After the war, the woman was charged with a criminal offence against her husband. The question was whether her legal position should be governed by the law prevailing during the Third Reich – a law now regarded as deeply unjust; or by the just law prevailing before and after the Nazi regime. In short, the case raised in direct and striking form the question whether law's validity – and with that validity, law's normative force - is dependent on its credentials as just or otherwise morally acceptable.

Hart defended the view that since the woman had committed no crime under the positive law of the time, the only legally valid way of criminalizing her would be by passing a piece of retrospective legislation. Although this was, on the face of it, an unjust solution, it might nonetheless be the morally preferable thing to do: the lesser of two evils. This solution had the distinctive advantage that it avoided blurring the distinction between 'what the law is' and 'what the law ought to be'. Some sacrifice of justice was, in these circumstances, inevitable: but in Hart's view the positivist position was both more consistent with a proper understanding of the rule of law than its naturalist alternative, and more sophisticated in recognizing that a respect for legality is not the only value in our morally complex world. Indeed, Hart would have agreed with his colleague and former student Joseph Raz's argument that the rule of law's 'virtue' is a relatively modest one, oriented primarily to transparency and effectiveness in communicating the law's demands, putting citizens on fair notice of what is legally required of them. It is,

hence, contingently rather than conceptually related to virtue in the substantive sense (Raz 1978). The Nazi regime was, of course, guilty of regular breaches of the rule of law even in this modest sense; but on Hart's formal conception of the rule of law, the informer laws, notwithstanding their substantive injustice, were not an instance of such a breach.

It is interesting to note, however, that at the foundation of Hart's argument lay not so much an analytic as a substantive moral claim, itself in turn partially dependent on a cluster of empirical claims. It is, according to him, morally preferable, more honest, to look clearly at the variety of reasons bearing on an ethically problematic decision rather than to close off debate by dismissing certain considerations as irrelevant, or by arguing that something never was the law because it ought not to have been the law. In a later confrontation with his successor in the Oxford Chair of Jurisprudence, Ronald Dworkin, Hart similarly characterized Dworkin's suggestion that judges might sometimes be morally justified in lying about what the law requires in order to avoid an unjust conclusion as an entirely unnecessary and obfuscating distortion of a conceptually straightforward, if morally problematic, issue (Dworkin 1977; see Hart 1982). The straightforward conceptual point is that, according to clear positivist criteria, a standard is identified as law. The complex issue is the practical conclusion which judges or other actors should draw from this identification where the standard is morally dubious or clearly iniquitous.

In Hart's engagements with both Fuller and Dworkin, his jurisprudential position is clearly informed by his political philosophy. There is a strong liberal aspect to his argument: it is up to citizens (as well as officials) to evaluate the law, and not merely to take it that the state's announcing something as law implies that it ought to be obeyed. The law's claims to authority are, on this view, strictly provisional. But there is equally a utilitarian strand to Hart's position: an implication that things will turn out better, in terms of resistance to tyranny, if citizens understand that there are always two separate questions to be

confronted: First, is this a valid rule of law? Second, should it be obeyed? Characteristically, Hart adduced no evidence in support of the second, empirical aspect to his argument. But it had a piquancy. This was not only because it gave his position a moral dimension but because a famous German jurist, Gustav Radbruch, had argued influentially that the experience of the Third Reich should turn us all into natural lawyers. In direct opposition to Hart's view, Radbruch argued that the positivist position was empirically associated with the unquestioningly compliant 'might is right' attitude widely believed to have assisted the Nazis in their rise to power.

Fuller, picking up on Radbruch's claim, argued that the Nazi law under which the woman had acted was so evil that it could not even count as a valid law. In his view, law – the process of subjecting human conduct to the governance of rules – was informed by an 'inner morality' of aspiration. Unlike the theological traditions, Fuller's was not a dogmatic, substantive natural law position: rather, it was a position which built out from certain valued procedural tenets widely associated with the rule of law. These included the requirements that laws be coherent, prospective rather than retrospective, public, possible to comply with, reasonably certain in their content and general in their application. Fuller's distinctive contribution was to make a link between form and substance: conformity with these procedural tenets would in his view, over time, 'work the law pure' in a substantive sense. It was this universal 'inner morality of law' which provided the necessary connection between law and morality, and not the 'external' or substantive morality which infused the content of law in different ways in different systems. When met to an adequate degree, this 'inner morality' guaranteed a law worthy of 'fidelity', underpinned the existence of an obligation to obey the law, and marked the distinction between law and arbitrary power.

Furthermore, Fuller claimed, Hart's own position could not consistently deny some such connection between law and morality. For in his argument about the open texture of language, Hart claimed that judges deal with 'penumbral' cases

by reference to a 'core' of settled meaning. This, Fuller argued, suggested that legal interpretation in clear cases amounted to little more than a cataloguing procedure. Yet even a very simple case such as a rule providing that 'no vehicles shall be allowed in the park', the idea that judges can appeal to a 'core' meaning of the single word, 'vehicle', was problematic. In deciding whether a tricycle or an army tank put in the park as a war memorial breached the rule, the core meaning of 'vehicle' in ordinary language would be next to useless in judicial interpretation: rather, judges would look to the purpose of the statute as a whole. And these questions of purpose and structure would inevitably introduce contextual and evaluative criteria in the identification of the 'core'. For Fuller, the interpretive force of these purposive criteria was closely bound up with the ideal of fidelity to law. Hart's and Fuller's engagement on the question of the rule of law therefore raised issues which went to the core of their overall legal philosophies.

Concept and context in Hart's argument

In this section, I want to argue that the way in which the Hart/Fuller debate was framed - its use of a particular instance to draw general theoretical conclusions - points up some ambiguities in Hart's general position, illuminating an interesting play in his work between analytic, universal claims and empirical, contingent ones. As is often remarked, one of the distinctive features of Hart's legal philosophy is its pretension to universality. He offers us not 'A Concept of Law' but The Concept of Law: a model which may purportedly be applied to legal phenomena whenever and wherever they arise. This methodological aspect of Hart's work has generated lively, and occasionally heated, controversy. 'Critical' and socio-legal scholars have suggested that, under cover of offering a neutral and descriptive theory, Hart in fact gives us a highly normative account: a rationalization of the hierarchical and centralised structure of the modern constitutional state as the acme of civilized achievement. This reading has been

fuelled by the occasionally (and uncharacteristically) incautious way in which Hart combines apparently historical with conceptual claims. The fable of secondary rules of recognition, adjudication and change as emerging to 'cure the defects' of a system composed exclusively of primary rules carries, it has been argued, an implicit evaluation of other sorts of legal order – customary systems, for example – as less advanced or civilized (Fitzpatrick 1999). Even the 'central case technique' – the idea that we can identify penumbral cases like international law which share some of the features associated with the central case of law, without banishing such phenomena to another discipline – carries a sort of evaluative loading. For 'central' cases may be understood as ideal types in an implicitly normative sense, while 'non-focal cases' like international law, though regarded as legal by association, are nonetheless 'primitive' in their lack of core features of law such as elaborated enforcement mechanisms or a powerful legislature. On this view, Hart's legal theory should have been combined with an explicit statement and defence of the particular political morality which underpins it, and of the point of view from which it is constructed and to which it accords theoretical priority (Finnis 1980: Chapter 1).

Hart's debate with Fuller provides another interesting instance in which to consider the relationship between avowed universality and unacknowledged locality in Hart's work. As we saw, Hart's position is informed by an analytic claim: law and morality are distinct; the rule of law is served by observing this distinction, and by acknowledging that difficult judgments, balancing and trading off incommensurable and potentially conflicting values, will on occasion have to be made. Yet the debate is, as we also saw, located in a very specific context: that of the post-war struggle to come to terms with the horrific Nazi episode, and in particular the effort to do so in legal terms which did not reproduce some of the abuses of legality which marked the Nazi regime. Importantly, the debate turns in part on an empirical disagreement about what sort of disposition towards law – a positivist or a naturalist one – will best equip a society to resist tyranny. It is therefore worth examining in a little more detail how this context affected both

Hart's argument and the arguments of his opponents.

Let us take Hart's argument first. It is made up of an interesting combination of optimism and of modest realism about the power of law. On the one hand, Hart was convinced that resistance to tyranny would be encouraged, rather than discouraged, by a positivist disposition to maintain a clear separation between law and morality. For the positivist implication that laws can be evil goes hand in hand in Hart's work with a liberal political theory which accords supreme importance to individual liberty. The appropriate posture of the liberal citizen vis à vis the law is one which combines both a willingness to attend to the claims of legitimate authority and, crucially, a recognition of individual responsibility to assess or evaluate that legitimacy. Liberal citizenship, in other words, implies a reservation of the right, and responsibility, to question authority, and to disobey it if necessary. In Hart's view, this disposition particular to liberal citizenship best equips a society to resist the domination of political tyranny and abuses of legal power. On the other side of the coin, Hart's position might be described, as compared with that of natural lawyers like Fuller, as a modest or realistic one. A standard's bearing the imprimatur of law is no guarantee of its substantive justice; indeed the need to maximize the chances of resistance to tyranny requires precisely this modest view of law's moral claims. In thinking about how to use law to address the past injustices perpetrated by the Nazis – including the oppressive informer laws under consideration in the debate – Hart's view is a pragmatic one. Law can indeed be used to right, in part, the wrong done in law's name. But this will be at the cost of sacrificing a presumptive component of the rule of law: i.e. the principle of non-retroactivity.

By contrast, the natural lawyer's view of law's role in confronting past injustice is less complex in one sense and more ambitious in another. It is less complex in that, on the naturalist view, the past injustice never had true legal authority; hence the concession of retroactivity does not have to be made. The Nazi system was so shot through with breaches of law's inner morality that it had lost

any claim to fidelity or legal authority. But the naturalist position implies an ambitious role for law, and one which places a great deal of faith in the symbolic as much as the instrumental power of what we might call 'a rule of law culture'. Furthermore, in the light of Fuller's assertion of a link between formal 'inner morality' and substantive justice, this ambitious view implies a rather different take on the problem of retroactivity itself. This is most strikingly exemplified by the Nuremberg Laws' creation/discovery of the concept of crimes against humanity, laws whose moral credentials override the apparent injustice of their retroactive application to those accused of committing atrocities during the Second World War. This moralized strand of international law has, of course, grown apace since Nuremberg, underpinning a range of developments in the fields of human rights, 'humanitarian intervention' and the massive extension of international criminal law. And this, arguably, betokens a shift in prevailing conceptions of the rule of law. In a burgeoning array of inter- and trans-national jurisdictions, judges are being called upon to engage in the interpretation of very broadly drafted treaties and charters of rights and freedoms. This encourages a style of adjudication focused on the assessment and balancing of broad, open-ended moral and political values. But it is not entirely clear that this is always an advance from the point of view of Hart's modest, formal conception of the rule of law. For a more wide-ranging, evaluative judicial style may imply, on the other side of the coin, a lessened judicial disposition to be sympathetic to claims about formal breaches of the principle of legality.

A recent example relevant to this issue was the decision of the European Court of Human Rights (ECtHR) in CR v UK. In this case, a man convicted of the rape of his wife claimed that the English House of Lords' decision that the marital rape exemption no longer stood violated the principle of legality enshrined in the European Convention of Human Rights (ECHR) in that it expanded the criminal law's prohibition and applied it retrospectively. Dismissing this argument in relatively summary terms, the ECtHR took a line reminiscent of the rationale for the Nuremberg Laws: to have sexual intercourse with someone, whether you are

married to them or not, without any belief in their consent, is so obviously wrong that the defendant was precluded from claiming that he had been unfairly treated in not having any notice that his behaviour would be regarded as wrongful. The terms in which the Court dismissed the appeal imply that criminal law has an immanent capacity to adapt itself to prevailing social standards within a broad framework provided by the ECHR. Its argument draws on an idea of 'manifestly' wrongful acts which is reminiscent of Fletcher's account of ideas of criminality underpinning the early common law (Fletcher, 1978): crime as that which would be readily recognised by all members of the community as wrongful. As one commentator put it:

'The Court stressed the importance of the guarantee enshrined in Article 7 and stated that it should be construed 'To provide effective safeguards against arbitrary prosecution, conviction and punishment.' But clearly the object and purpose of this essential guarantee should not be interpreted at the expense of other objectives of the Convention itself. The Court seemed to acknowledge this by stating that '[t]he essentially debasing character of rape is so manifest that the result of the decision [of the English appellate courts] cannot be said to be at variance with the object and purpose of Article 7 of the Convention'. The Court then added that the abandonment of the 'unacceptable idea' of the marital rape exemption conformed not only with a 'civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention', namely human dignity and freedom.' (Palmer 1997: 95-6)

This sort of constitutional adjudication might well be characterized in terms of an approach resonating with natural law theory. It is an approach which has perhaps greater resonance with the ancient common law practice of courts' declaring broad offences such as 'conspiracy to corrupt public morals' in their role as 'guardians of social morality' than would be comfortable for liberal critics

of that practice such as Hart (Hart 1963). The line between interpretations which meet the rule of law's fair notice requirement and ones in which courts essentially arrogate to themselves a legislative role which implies retroactive application is, under any circumstances, a fine one. But there is nonetheless an issue of context-dependence here. For the line becomes yet more blurred as societies become more heterogeneous and pluralistic. Concepts of 'obvious wrongfulness' and 'manifest criminality' are, in other words, easier to invoke in stable, homogeneous societies. This makes their re-emergence in contemporary international legal culture somewhat ironic.

Historicising the rule of law

Is the striking contrast between natural law and positivist positions, then, best understood as a philosophical disagreement? Or is it rather – or equally – a practical disagreement about what institutional arrangements are likely to maximize the realization of valued social ends or ideals under specific social and historical conditions? Does the debate between Hart and Fuller centre on a timeless conceptual distinction? Or is its lasting significance as much to do with the vivid context in which it framed perhaps one of the most pressing moral and political questions confronting post-Enlightenment constitutional democracies: how to develop laws capable of constraining abuse of power, and of addressing such abuses? These may seem false dichotomies: philosophical debates – particularly those in legal, moral or political philosophy – do, after all, confront pressing practical issues, and not merely conceptual disagreements. But the distinction directs us to an important component of the debate, and one which is often obscured within philosophical analysis: the importance of the context in which the debate is framed in illuminating not merely the concept of the rule of law but also its point, purpose, function or social role. To put this in the terms of the linguistic philosophy by which Hart was influenced, contextualizing the debate helps us to look to the 'use' rather than the 'meaning' of the concepts in which we

are interested, and to ask questions about the preconditions under which particular conceptions of, or dispositions towards, the rule of law are likely to take hold. For it seems likely that the question of whether a positivist or a naturalist attitude to law would best equip a society to resist tyranny is itself historically contingent to some degree. In an intensely hierarchical and unequal society, for example, Hart's liberal vision would simply be unfeasible, and an inculcation of Fuller's natural law vision a possibly more practical way of encouraging resistance to abuse of power. In this respect, it is instructive that, in early modern societies, political and legal dissent was so frequently framed in terms of religion or other matters of conscience.

To take this argument further, let us consider how an historical analysis focused on 'use' rather than 'meaning' of the rule of law might modify our view of its contours and significance. At its most basic level, we find the concept of the rule of law reaching back into classical philosophy, with the Ancient Greek idea of 'the rule of law and not of men'. A thin concept of the rule of law as signifying regular constraints on political power and authority might plausibly, then, be seen as 'the central case' of the concept. But if we look at thicker, richer conceptions of the concept – the different ways in which, and purposes for which, it has been invoked - historical specificity quickly enters the picture. Let us take a few examples. In a highly centralized and authoritarian system such as the monarchies of early modern England, it is not clear that the operative concept of the rule of law can intelligibly be read as implying the universal application of law, reaching even to the sovereign. This idea – central to modern notions of the rule of law - was the object of long political contestation, and took centuries to be accomplished. We can, surely, acknowledge that the Eighteenth Century conception of the rule of law in England was different to that in the Twelfth Century without concluding that no such conception existed: indeed, it existed in part as a critical conception which informed some of the political conflicts which shaped modern constitutional structures. The conception of universality is itself tied up, in other words, with the emergence of a certain idea of limited

government. The interpretation of the requirement that laws should be reasonably susceptible of compliance has similarly changed in tandem with shifting notions of human autonomy and entitlements. Right up to the early Nineteenth Century, English law, while priding itself on its respect for the rule of law and the 'rights of free-born Englishmen', included a variety of criminal provisions – notably those on vagrancy – which manifestly violated, in relation to certain sub-groups of the population, today's conception of possibility of compliance. This was not just a question of a practical inability to match up to acknowledged ideals: it was also a matter of whether this was seen, normatively, as a problem.

In other cases, it is not so much the development of political ideas as the practical preconditions for realizing them which underpins their changing contours. An example here would be the tenet, widely shared in today's constitutional democracies, that the law should be publicized and intelligible. Even today, this ideal is difficult to realize. But it would have been a far more distant ideal in societies with very low levels of literacy and without developed technologies of communication such as printing. A further example of this kind relates to the ideal that official action should be congruent with announced law. It seems obvious that this tenet must have a significantly different meaning in today's highly organized, professionalized criminal justice systems than in a system like that of England prior to the criminal justice reforms of the early Nineteenth Century. This was, after all, a system in which criminal justice enforcement mechanisms were vestigial, with no organized police force or prosecution, and much enforcement practice and indeed adjudication lying in the hands of lay prosecutors, parish constables and justices of the peace. There was no systematic mechanism of law reporting and hence of communicating the content of legal standards to those responsible for their enforcement, nor any systematic process of appeals which could test and establish points of law.

These institutional features of Eighteenth Century English criminal justice also had significant implications for the law's achievement of coherence. While the system of precedent of course conduces to both substantive coherence and even-handedness in enforcement, the relatively disorganized mechanisms for appeal and law reporting gave rise to the possibility of significant regional variations – particularly in relation to criminal adjudication handled by lay justices rather than assize judges. (To get a sense of the relative scales here, it is worth knowing that it has been estimated that in the mid-Eighteenth Century, there were about 5,000 justices, as opposed to just 12 Assize judges). Again, standards associated with today's rule of law played an important role in underpinning the modernizing reform movement from the late Eighteenth Century on. But the fact is that, for many decades, these sorts of discretionary arrangements, inimical to our view of adequate levels of coherence and congruence, were regarded not merely as acceptable but as consistent with respect for the rule of law. For the rule of law was, at that time, embedded within a highly personalized model of sovereign authority; one in which the discretionary power of mercy was a core rather than a penumbral feature (Hay 1975). Ideals do, of course, underpin arguments for reform; but ideals themselves are constrained by existing institutional capacities.

Does this imply that the rule of law in Eighteenth Century England was an empty ideological form, an aspect merely of the rhetoric of those in power? This would be too quick a conclusion. As two influential historians have put it,

[T]he notion of the 'rule of law' was central to seventeenth and eighteenth century Englishmen's understanding of what was both special and laudable about their political system. It was a shibboleth of English politics that English law was the birthright of every citizen who, unlike many of his European counterparts, was subject not to the whim of a capricious individual but to a set of prescriptions that bound all members of the polity. Such a characterization of the English 'rule of law' will not, of course, pass

muster as an accurate description of the *modus operandi* of the legal process, but it did serve as an idealization, a potent 'fiction' . . . which commanded widespread assent from both patricians and plebeians. The purchase of this ideology of the 'rule of law' had several important consequences . . . Those in authority were constrained to some extent by their obligation to act in accordance with this ideology . . .; (Brewer and Styles 1980: 14)

The rule of law, then, is double-edged: it plays a role in both constraining and legitimising power. In thinking about the rule of law, we therefore need to assess both its status as a modern ideal of democratic governance *and* its changing role in legitimising and constraining certain forms of state power. In reflecting on the relationship between the rule of law and the perceived legitimacy of legal systems, it is worth considering, for example, the capacity of the rule of law *under certain social and historical conditions* simultaneously to structure political power and yet to legitimise laws which might be regarded as fundamentally unjust. The delicate balance between legitimacy and power is well illustrated by E.P. Thompson's study of the Black Act of 1723. This statute, which dealt with poaching, enacted broad offences with draconian penalties: it was a piece of legislation which, in Thompson's words (1975:197), 'could only have been drawn up and enacted by men who had formed habits of mental distance and moral levity towards human life -- or, more particularly, towards the lives of the "loose and disorderly sort of people"'. Yet Thompson's study testifies also to the sense in which the rule of law genuinely constrained political power. It is worth quoting his well-known conclusions – themselves framed in terms resonant with Hart's positivist conception - at some length:

'...It is inherent in the especial character of law, as a body of rules and procedures, that it shall apply logical criteria with reference to standards of universality and equity. It is true that certain categories of person may be excluded from this logic (as children or slaves), that other categories may

be debarred from access to parts of the logic (as women, or, for many forms of eighteenth-century law, those without certain kinds of property), and that the poor may often be excluded through penury, from the law's costly procedures. All this, and more, is true. But if too much of this is true, then the consequences are plainly counterproductive. Most men have a strong sense of justice, at least with regard to their own interests. If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just. And furthermore it is not often the case that a ruling ideology can be dismissed as a mere hypocrisy; even rulers find a need to legitimize their power; to moralize their functions, to feel themselves to be useful and just . . . The law may be rhetoric, but it need not be empty rhetoric.... T]here is a very large difference, which twentieth-century experience ought to have made clear even to the most exalted thinker, between arbitrary extra-legal power and the rule of law. And not only were the rulers . . . inhibited by their own force . . . but they also believed enough in these rules, and in their accompanying ideological rhetoric, to allow, in certain limited areas, the law itself to be a genuine forum within which certain kinds of class conflict were fought out. There were even occasions . . . when the Government itself retired from the courts defeated. Such occasions served, paradoxically, to consolidate power, to enhance its legitimacy, and to inhibit revolutionary movements. But, to turn the paradox around, these same occasions served to bring power even further within constitutional controls.' (Thompson 1975: 259-65)

Eighteenth Century rulers – like their successors today – ‘traded unmediated power for legitimacy’ (Brewer and Styles 1980: 14). But the form which this

mediation takes has varied substantially over time and space. In Europe, the quest for modern limited government realised itself in the great legal codes of the Nineteenth Century, in which the principle of legality was a key symbol of progress and modernity (Farmer 1997). In the USA and many European countries, judicial review not only of executive action but of legislation in relation to a strong Constitution became the benchmark of limited government – an institutional arrangement which became acceptable in Britain only with the passage of the Human Rights Act at the start of the Twenty-First Century and then only in highly attenuated form. The first steps towards institutionalising an international rule of law emerged only in the Twentieth Century and, as we saw, that of an ambitious, human rights-oriented, moralised international law, only after the Second World War. All these conceptions of the rule of law are born of their environment: the ideal takes its complexion both from perceived problems - whether arising from war, revolution, atrocities or ideological struggles - and from perceived institutional capacities.

Case study: the presumption of innocence

I now want to focus on one aspect of contemporary criminal procedure which is regarded in most countries as a core aspect of the rule of law and principle of legality: the idea that those accused of criminal offences should be presumed to be innocent until proven guilty according to a distinctive and robust standard of proof (Hart 1968). In tracing the history of this particular aspect of the rule of law, I will deploy a methodological framework which I have developed in the context of a long-term project analysing the development of conceptions of responsibility for crime (Lacey, 2001a, 2001b). My starting assumption is that specific patterns of responsibility-attribution relate to various roles and needs of a criminal justice system: a need for legitimation, and a practical need to specify and coordinate the sorts of knowledge which can be brought into a court room. The imperatives set by these needs for legitimation and coordination are, needless to say, changing over time, as the political, cultural, economic and

institutional environment of the criminal process shifts. This overall method, oriented to the use to which normative ideas are put in practical contexts, rather than to a decontextualised conceptual analysis of their meaning, can, I would argue, equally be applied to other key ideas, including the rule of law in general and the presumption of innocence in particular.

Given what we have learnt so far about the currency of ideals of the rule of law in Eighteenth Century England, one might have expected the presumption of innocence in English criminal cases to have long been firmly established. This expectation, however, is disappointed by a careful appraisal of the historical facts. To see why, we need to understand something about the way in which criminal processes worked at this time. In the early Eighteenth Century, most criminal trials were a highly non-technical affair: a conversation between the accused and the court – trial, as John Langbein has put it, as altercation (Langbein 2003). Levels of lawyers' involvement – with the important exception of treason trials and certain other highly technical areas such as forgery – were low: felony defendants had no right to be represented by Counsel until 1836, and though judges were increasingly exercising their discretion to allow counsel to engage in examination of witnesses from the middle of the Eighteenth Century, they had no right to address the jury until the passage of the 1836 legislation. The average length of a criminal trial in the last decades of the Eighteenth Century has been estimated at about 20 minutes, with Assizes hearing between 20 and 30 cases a day. This fact in turn lends weight to the judgment of one of the most influential historians of the period that the criminal trial operated up to the early Nineteenth Century on something far closer to a presumption of guilt than a presumption of innocence (a doctrine which, like the special criminal standard of proof, in any case received no judicial formulation until the late Eighteenth Century) (Langbein 2003: 263; 1987: 82ff; 1978: 236).

While treatises and commentaries on criminal law and its doctrines had of course existed for several centuries, their impact on run-of the mill cases can all too

easily be over-estimated. Until well into the Nineteenth Century, there was no systematic law reporting, nor was there any regular system of appeals through which points of law could be tested until 1908 (King 2007 Chapter 1, esp. pp. 14ff, 32ff; see also King 2000). In relation to assize cases, before the creation of the Court for Crown Cases Reserved in the mid-Nineteenth Century, difficult cases might be referred to colleagues on a judge's return to London; but neither this nor the CCR amounted to a systematic appellate process of the sort regarded, from the Twentieth Century on, as central to a precedent-based system. The law of evidence was still developing throughout the period, and the overwhelming bulk of evidence was either eye-witness testimony about conduct or evidence as to the defendant's or complainant's character and reputation. This evidence was focused on the accused's reputation and social position, but inferences about disposition appear to have been a natural corollary. Since the accused's confrontation with the jury was the kernel of the trial, wherever direct evidence of conduct was ambiguous, the jury's assumptions about his or her character (and that of witnesses) were central to the chances of exculpation: to judgments of credibility, to the reception of pleas for mercy, and to the likelihood of partial verdicts: all crucial matters in a trial often focused on the key question of whether the death penalty would apply or not (Beattie 1991: 231-2).

Though this looks to us like both a chaotic system and one which violated key precepts of the rule of law, further reflection suggests that this is an ahistorical and distorting view. In the context of the highly personalised system of authority prevailing up to the late Eighteenth Century, the discretionary system of mercy itself constituted a guarantee of law's authority, and may hence be regarded, paradoxically, as an aspect of the Eighteenth Century conception of the rule of law (Hay, 1975). Similarly, the system's – to our eyes extraordinary – reliance on hearsay evidence about character and reputation itself represents a set of institutional capacities unthinkable to contemporary systems of criminal justice: the ability to draw, within a lay-dominated process located in a relatively immobile and stratified world, on local knowledge. This is not to make any normative

evaluation of the Eighteenth Century system. It is simply to point out that its capacities, and needs, for legitimation were significantly different from those of our criminal processes today. These differences shaped to a significant degree normative concepts such as the rule of law in terms of which the system was rationalised and, ultimately, reformed.

Conclusion

Like ideas of responsibility, conceptions of the rule of law have played an important role in both the legitimation of criminalising power and its coordination. At its thinnest conceptual baseline, the rule of law has always stood for the notion that power is constrained by its exercise according to legal forms. But the nature and extent of these constraints has, inevitably, varied over time. Nor has this been a story of inexorable progress - a 'Whig' history of the gradual realisation of a 'full' conception, or 'central case' of the rule of law through the era of legal modernisation and political democratisation. As forms of political power change, and as the balance between political, economic and legal power shift, the forms which the rule of law takes – and needs to take – shift too. Rich conceptions have to be informed by a sense of context and purpose: they are historically and institutionally specific.

But this does not mean that particular conceptions of the rule of law are beyond critique: nor that philosophical analysis has no role to play in that critical process. To see why, it is helpful to return to the Hart-Fuller debate, and to some of its contemporary implications. As I argued earlier, one of the interesting things about the debate, as we look back at it half a century on, is the way it frames the dawning of an ambitious idea of an international rule of law oriented to the universal holding of states and state officials to certain basic criminal law standards. The lessons of the next fifty years of international law history provide some interesting tests for both Hart's and Fuller's arguments. In one sense,

Fuller has history on his side: the idea that, however complete the formal imprimatur of actions as legitimated within a state legal order, they can be held to account – even, or perhaps especially, in the person of a head of state – in the international legal arena resonates with the idea of a universal morality of law. Yet, as Hart would have been quick to point out, many of the atrocities committed by means of state power could be – indeed often are – framed within formally legitimate authority.

Another influential (and more substantive) natural lawyer, John Finnis, has tried to shore up this apparent weakness in Fuller's argument, by asking why any tyrannical ruler, not motivated by the common good of his or her subjects, would be concerned to respect the – often costly or otherwise inconvenient – constraints represented by Fuller's eight canons of the inner morality of law (Finnis 1980). Within the realpolitik of international relations, however, the answer to Finnis's question is clear. Meeting formal criteria of legitimacy – whether by signing up to treaties and conventions, or observing elaborate legal procedures – can be a crucial gateway to international recognition, and hence to all sorts of material benefits – economic aid not the least among them. In the face of the need to keep 'members of the international community' on board – at least ostensibly playing the game of international legality and good citizenship – international law has developed flexible forms which make the Eighteenth Century English criminal justice system seem positively rigid and legalistic. One of the most significant of these is the mechanism which allows states to ratify treaties subject to exclusions or reservations. One striking illustration of the upshot of this flexible mechanism is the fact that Afghanistan, in the era of the Taliban, became a signatory to the highly progressive Convention on the Elimination of all Forms of Discrimination against Women. My surmise is that Hart would have regarded this as clear evidence of the pitfalls of an approach which makes too ambitious a claim for both law, and the progressive potential of the rule of law. The formal aura of legality and universality is, after all, not a

sufficient guarantee of a rule of law worth the name – i.e. a rule of law located within institutional arrangements with a real capacity to constrain power.

So, even leaving aside the capacity of global super-powers to ignore international law or to subvert it by subjecting it to creative interpretations which happen to serve the national interest, the recent history of the international rule of law appears to support the modest, positivist position which Hart defended against Fuller. But the lessons of this recent history also remind us of the need to contextualise our analysis of normative concepts within an understanding of the needs and capacities of the broader institutions within which they function: nation states, and criminal justice systems at the national or international level. Just as its resonance with a modern, impersonal model of authority underpinned the reception of The Concept of Law so, I would argue, does the huge moral, political and cultural diversity of the inter- and trans-national legal terrain in which we now expect the rule of law to operate reinforce Hart's case for a modest and formal conception. Though offered as an analytic claim, Hart's argument about the rule of law may usefully be read, then, as an astute, historically grounded assessment of the (modest) institutional capacity of law to tame power in the modern world. It is only through a dialogue between conceptual, philosophical analysis, and socio-historical interpretation of the conditions of existence and potential use of ideas, that a rounded understanding of the potential and limits of the rule of law can be approached.

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